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No. 80-1666
IN THE

Supreme Court of the United States

October Term 1980

JOHN R. LARSON, etc., *et al.*,

Appellants,

vs.

PAMELA VALENTE, *et al.*,

Appellees.

On Appeal From the United States Court of Appeals for the Eighth Circuit.

MOTION TO AFFIRM.

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Questions Presented.

1. Whether appellees, plaintiffs in the district court, have standing to challenge on establishment clause grounds a Minnesota statute which has been applied to them and which therefore injures them in fact.

2. Whether the church exemption provision of the Minnesota Charitable Solicitations Act, which on its face subjects some churches but not others to a series of onerous burdens required by the substantive provisions of the Act, thus favoring some churches over others, violates the establishment clause of the first amendment.

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JOHN R. LARSON, etc., *et al.*,

Appellants,

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Appellees.

MOTION TO AFFIRM.

Appellees, pursuant to rule 16.1(c) of the Rules of the Supreme Court of the United States, move that the judgment of the United States Court of Appeals for the Eighth Circuit be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Statement of the Case.

1. The Proceedings Below.

The present action, brought pursuant to 42 U.S.C. §1983 (1976), sought a declaration that the Minnesota Charitable Solicitations Act, Minn.Stat. §§309.50-.61 (1980) [hereinafter sometimes cited as the Act] is unconstitutional as violative of the first and fourteenth amendments and an

injunction against its enforcement.[1] Plaintiffs in the action as originally filed were four individual members of the Holy Spirit Association for the Unification of World Christianity [the Unification Church or the Church]. Named as defendants were the two Minnesota officials charged with the enforcement of the Act, John R. Larson, the Commissioner of Securities, and Warren Spannaus, the Attorney General [hereinafter collectively referred to as the state].

The complaint was filed on October 11, 1978. At the same time, plaintiffs filed a motion for preliminary injunction against enforcement of the Act. Defendants-appellants [hereinafter referred to as appellants] opposed the motion on the merits and also filed a motion to dismiss, or, in the alternative, to join the Unification Church as a party. After the federal complaint had been filed, but before the preliminary injunction had been heard, the State of Minnesota filed an action in state court against the Church, alleging that the latter was in violation of certain provisions of the Act. Prior to the hearing, the parties entered into a stipulation whereby the Unification Church was joined as a plaintiff to the federal action and the state action was stayed.

The preliminary injunction motion was heard on January 25, 1979 by Magistrate (now Judge) Renner. On March 5, 1979 the magistrate filed his Report and Recommendation which concluded that the motion should be granted. Jur. St. A-36. Appellants immediately filed objections to the Report

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[1]Apart from the establishment clause issue determined by the court of appeals, appellees raised in the district court numerous other constitutional challenges to the Act. They argued, for example, that the Act vested impermissible discretion in state officials to grant, deny, revoke or suspend permission to engage in the exercise of first amendment rights; failed to conform to required first amendment due process safeguards; violated the equal protection clause; violated the free exercise clause by overbroad intrusion into the financial affairs of churches; and contained a variety of other constitutionally impermissible restrictions on the exercise of first amendment rights. Under the terms of the Eighth Circuit decision, litigation of these issues on remand to the district court is open.

and Recommendation and moved that it be rejected by the court. An additional hearing was thereafter held before Judge Lord, and on July 5, 1979 the court filed an order upholding the magistrate's conclusions. *Id.* A-35.

A motion for summary judgment was then made by plaintiffs-appellees [hereinafter referred to as appellees] in which it was contended that the Act was unconstitutional. Appellants responded by themselves moving for partial summary judgment.

The new set of motions was heard by Magistrate Renner on August 31, 1979. The Report and Recommendation, issued on November 15, 1979 recommended that both motions be granted in part and denied in part. *Id.* A-20. The major conclusion of the Report was that, because the exemption provision works an establishment of religion, the Act is "unconstitutional as applied to religious organizations and members thereof" and that its enforcement should be permanently enjoined as to such organizations. *Id.* A-34. Other rulings in the Report concerned the application of the Act to non-religious organizations and the constitutionality and justiciability of various enforcement provisions of the Act. *Id.*

Defendants again objected to the magistrate's conclusions. For their part, plaintiffs challenged the Report and Recommendation only insofar as it subsidiarily had concluded that a sharp distinction should be drawn for constitutional purposes between solicitation by religious organizations and by non-religious charitable organizations.[2] By order dated January 9, 1980 and filed January 21, 1980 the district court granted judgment as recommended by Magistrate Renner. *Id.* A-18.

In an opinion dated January 7, 1981, *id.* A-1, the Eighth Circuit generally upheld the judgment of the trial court.

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[2]By order the appellees were precluded from raising this issue in the court of appeals.

Specifically, the court of appeals held, first, "that plaintiffs have standing to challenge the classification made in the exemption section of the Act" pertaining to religious organizations. *Id.* A-4, 637 F.2d 562, 571 (8th Cir. 1981). Second, the exemption provision was held to be unconstitutional as an establishment of religion because it lacked both a secular purpose and a neutral effect. *Id.* A-5 to A-14, 637 F.2d at 567-69. Third, the proper relief was held to be an extending the exemption provision to all churches rather than excising it entirely from the Act. *Id.* A-15, 637 F.2d at 570.

Only the conclusions that no part of the Act could be applied to a church and that any organization claiming to be a church should be exempt were vacated and remanded for "further development". *Id.* A-17, 637 F.2d at 571. Under the latter holding the state is apparently free to attempt to prove that the Unification Church is not a "religious organization", *id.* A-16, 637 F.2d at 570, within the perimeters of this Court's decisions and those of *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957), which the Eighth Circuit carefully noted, *id.* A-17, 637 F.2d at 570-71.

The lower courts were thus unanimous in their agreement on what is for present purposes the central issue of the case, that the exemption provision works an establishment of religion. Appellees prevailed in their critical claim that the onerous provisions of the Act cannot be applied to them, as they have no doubt whatsoever that they will prevail should the state undertake to prove that the Unification Church is not a religious organization, and they do not cross-appeal or seek to disturb the judgment of the court of appeals.

2. The Statutory Scheme.

Prior to 1978 the Minnesota Charitable Solicitations Act, now Minn.Stat. §§309.50-.61 (1980), in effect exempted all religious solicitations from its requirements, as was and

is the general practice of states which regulate these matters.[3] This condition of benign neglect was drastically altered by the amendments enacted by 1978 Minn. Laws. ch. 601, which among other things applied the substantive provisions of the Act to churches, a change which, however, was not across-the-board. With minor exceptions the only churches not exempted from the amended Act are those which derive their financial support primarily from appeals to the public rather than from their own members. Those churches included within the Act's requirements are subject to a process of registration and detailed financial accounting to the state. The Act, in addition, permits exhaustive official investigation of the inner workings of churches which solicit funds within Minnesota.

Thus, the radical effect of the 1978 amendments was to require the state to exercise close scrutiny and careful supervision over some, but not all, churches which seek to raise money for purely religious purposes. A long-existing church or religious society with a large, permanent membership is, in effect, exempt from the onerous burdens of the Act even if it solicits a substantial amount of money from the public. Similarly, a new branch of a church which can turn to sister organizations of the same denomination in its early years will also escape these burdens. In contrast, a newly-established church which has little or no source of financial support other than the public at large is subjected to the full weight of the Act's comprehensive regulatory scheme.

Although appellees attacked the Act as a whole and on numerous grounds in the trial court, only those portions of it that relate to the exemption of churches were considered

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[3]Besides Minnesota only North Carolina seems to have adopted the selective regulation at issue in this case. Both laws have now been held to be unconstitutional by an impressive number of judges. See Jur. St. A-14 n.8, 637 F.2d at 569 n.8. That any other states would choose to follow this model in light of its thorough condemnation is unlikely.

by the court of appeals and are drawn in question by appellants here. The requirements of the Act apply to all "charitable organizations" except those exempted by section 309.515. The burdens imposed upon non-exempt organizations include the filing of a detailed registration statement under section 309.52 before any solicitation may take place. Each organization subjected to the Act must file an annual report pursuant to section 309.53, which must disclose extensive financial information and, most likely, be audited.

A "charitable organization" is defined by section 309.50(4) as any person or organization "who engages in or purports to engage in solicitation for a charitable purpose". The term "charitable purpose" is in turn defined by section 309.50(3) specifically to include "any . . . religious . . . purpose, either actual or purported." Thus, a "charitable organization" within the meaning of section 309.414(1)(a) includes any organization which engaged in solicitation for a religious purpose, *i.e.*, virtually any religious organization or church.

From the class of all churches, section 309.515(1)(a) exempts those that receive total contributions worldwide of less than $10,000 and whose administration and clergy receive no money from the fund raising efforts. But also exempt is

> [a] religious society or organization which received more than half of the contributions it received in the accounting year last ended (1) from persons who are members of the organization; or (2) from a parent organization or affiliated organizations; or (3) from a combination of the sources listed in clauses (1) and (2). A religious society or organization which solicits from its religious affiliates who are qualified under this subdivision and who are represented in a body or convention is exempt from the requirements of sections 309.52 and 309.53. The term "member" shall not include those persons who are granted a membership

upon making a contribution as a result of the solicitation.

Section 309.515(1)(b).

This provision was the subject of the ruling of the court of appeals. The court concluded that the selective regulation of religious organizations that appears on the face of the exemption contravenes the establishment clause.

The Questions Are Unsubstantial.

1. Appellees' standing to challenge the Minnesota Charitable Solicitations Act as violative of the establishment clause is manifest. Appellees are injured in fact by the statute since the state has sought to apply the law to them and such application would directly prohibit and inhibit the solicitation activities which appellees propose to conduct within Minnesota. *McGowan v. Maryland*, 366 U.S. 420 (1961), among other cases, leaves no doubt as to appellees' standing. In the allegedly conflicting case, *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 628 F.2d 1289 (10th Cir. 1980), no injury in fact to the plaintiffs was present.

2. The Minnesota statute clearly works an establishment of religion under the "primary purpose and effect" standard of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), since on its face it favors some religions over others by burdening the non-preferred churches with numerous requirements of registration and disclosure while exempting other churches from these provisions. The disfavored churches are those that obtain their funding primarily through solicitations from the public rather than from donations from their members. Such state-conferred advantages based upon mode of religious practice and organization violate the neutrality mandated by the establishment clause as explicated in a long line of cases, for example, *School District v. Schempp*, 374 U.S. 203 (1963). In addition, the differential effect of the exemption is rendered even more obviously non-neutral by the fact that its fit with respect to its supposed purposes is

extremely tenuous and the fact that it would most heavily burden unconventional religions. The decision of the Eighth Circuit is fully in accordance with that of the North Carolina Supreme Court in the only other case to have considered the constitutionality of a statute of this kind, *Heritage Village Church & Missionary Fellowship, Inc. v. State*, 299 N.C. 399, 263 S.E.2d 726 (1980).

The decision below does not conflict with *Gillette v. United States*, 401 U.S. 437 (1971), which involved only a de facto, not as here a de jure, preference of religions. Also, unlike the present case, the conscientious objection statute in *Gillette* represented a considered legislative accommodation of the free exercise and establishment clauses.

ARGUMENT.

I.

Appellees Have Standing to Raise Establishment Clause Claims.

Appellees are injured in fact by the Minnesota Charitable Solicitations Act, Minn.Stat. §309.50-.61 (1980), and they therefore have standing to challenge its validity. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 737-39 (1972). This elementary proposition is ignored by the state, which complains that the court of appeals applied the "overbreadth doctrine" and did not require that the Unification Church first prove that it is a religious organization before raising establishment clause claims.

Virtually every establishment clause case decided by this Court refutes the state's position. In no case has inquiry into the religious beliefs or practices of a litigant raising an establishment claim been required.[4] On the contrary, this Court has only inquired as to whether the plaintiffs "have suffered direct economic injury", allegedly due to the operation of the law in question. *McGowan v. Maryland*, 366 U.S. 420, 430 (1961). If so, the litigants "have standing to complain that the statutes are laws respecting the establishment of religion". *Id.* at 431.

Therefore anyone directly affected by a law asserted to constitute an establishment may challenge it, be he a businessman affected by a Sunday closing law, *McGowan v. Maryland, supra*, or be he a taxpayer affected by a governmental expenditure, *Flast v. Cohen*, 392 U.S. 83 (1968); *Everson v. Board of Education*, 330 U.S. 1 (1947), or be he a parent or child affected by a state mandated prayer,

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[4]That a court could do so at all consistently with the Constitution is dubious. *See United States v. Ballard*, 322 U.S. 78, 87 (1944) ("Man's relation to his God was made no concern of the state"). *See Thomas v. Review Bd.*, 49 U.S.L.W. 4341, 4343-44 (U.S. Apr. 6, 1981) (No. 79-952).

Engel v. Vitale, 370 U.S. 421, 430-31 (1962), or Bible reading, *School District v. Schempp*, 374 U.S. 203, 224 n.9 (1963). Whether or not the challenging party is engaged in religious practice, an overtly non-religious or anti-religious practice, or no religious practice at all matters not. All that matters is that the litigant be injured in fact by the operation of the law, as the appellees surely have been.

Compared to the attenuated effect of the laws which this Court has found to be justiciable under the establishment clause, the direct effect of the registration and disclosure requirements are more than sufficient to create standing. The effects on the appellees here are prohibition or inhibition of their activities[5] rather than mere passive participation in a practice offensive to them. Moreover, the indirect pressure to conform to more conventional religious views caused by the operation of the Act reinforces the conclusion that standing is present.

The demonstration of the infliction by the law of direct injury in fact on the appellees distinguishes this case *toto coelo* from *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 628 F.2d 1289 (10th Cir. 1980), in which there was no showing of a direct or even a casual connection between the challenged act and any injury in fact to the named plaintiff. *Id.* at 1295. This

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[5]The individual appellees could be forbidden to solicit funds until the church has registered, a requirement from which the favored churches are exempt, and the state has threatened to seek precisely this relief. Also, the names of individual church members may become known through financial disclosure provisions from which the favored churches are exempt. The church itself would be subject to the onerous registration provisions which are at the heart of the statute if the selective exemption is allowed to stand. And since the Unification Church claims to be a religious organization, it will be handicapped in its competition with conventional churches for donations from the public whether or not it actually is one. Hence the appellees are, contrary to the assertion of the state, Jur. St. 9, raising their own rights when they complain of the establishment worked by the exemption provisions.

case[6] and *Citizens Concerned* are therefore entirely consistent, and the division in the circuits that the state asserts to exist is simply a figment of its imagination.

In sum, appellees have standing to challenge the statute under the establishment clause pursuant to the decisions of this Court over the last two decades. The decision of the Eighth Circuit was therefore quite right and should not be disturbed.

II.

The Effect of the Statute Is to Advance Some Churches and Inhibit Others in Violation of the Establishment Clause.

The Eighth Circuit, in agreement with the district court, correctly held that the church exemption provision of the Minnesota Charitable Solicitations Act, Minn.Stat. §309.515(1)(b) (1980), which "single[s] out . . . particular church[es] or religious group[s]," *Walz v. Tax Commission*, 397 U.S. 664, 673 (1972), for favored treatment by the state, violates the establishment clause of the first amendment.[7] Jur. St. A-5 to A-14, 637 F.2d 562, 565-69 (8th Cir. 1981). The court of appeals so held in reliance upon the familiar tripartite formulation of *Lemon v. Kurtz-*

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[6]The decision of the Eighth Circuit relied more upon *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980). Most likely this approach was triggered by the incessant emphasis of the state in that court on another free speech case, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), to which *Schaumburg* is an appropriate rejoinder. But in any event, the court below was clearly correct, for the reasons stated herein, in concluding that the character of the plaintiff church as a religious organization or not is irrelevant to whether it and its members have standing in this case.

[7]The first amendment's establishment clause, like its other provisions, is applicable to the states through the fourteenth amendment. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

man, 403 U.S. 602 (1971),[8] which the Court just this Term has had occasion to iterate. *Stone v. Graham*, 101 S.Ct. 192, 193 (1980) (No. 80-321) (per curiam).

The district court and the court of appeals collectively found that the provision principally at issue was at odds with all three portions of *Lemon*.[9] However, since a violation of any one of the *Lemon* principles is sufficient to entail a violation of the clause, *Stone v. Graham, supra*, 101 S.Ct. at 193, and although appellees believe that the judgment may be affirmed under all three standards, it is necessary for present purposes to look no further than the ground common to both courts below,[10] the "principal or primary effect" branch of the *Lemon* test.

The statute at issue is an explicit legislative classification of churches. It subjects some, those which, with minor exceptions,[11] receive more than half of their total contributions from the public, no matter how small their total volume of contributions, to onerous requirements of financial disclosure and reporting to the state but exempts from these requirements the remainder, no matter how large the dollar amount they may receive from the public.

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[8]First, the statute must have a secular legislative purpose; secprincipal or primary effect must be one that neither advances nor inhibits religion . . .; finally the statute must not foster "an excessive government entanglement with religion."
Id. at 612-13 (citations omitted).

[9]The district court relied upon the second and third parts of the *Lemon* test but did not reach the first. Jur. St. A-18 to A-19 (order granting summary judgment), *incorporating by reference id.* A-24 (magistrate's report and recommendation on summary judgment), *incorporating by reference id.* A-62 to A-65 (magistrate's report and recommendation on preliminary injunction). The court of appeals found violations of the first and second parts but declined to reach the third. Jur. St. A-14, 637 F.2d at 569.

[10]See note 9, *infra*.

[11]All churches with total contributions of under $10,000 are exempt, provided however that they meet three additional conjunctive criteria. Minn.Stat. §309.515(1)(a) (1980).

Entirely in accord with the North Carolina Supreme Court, the only other court to have considered the question, *Heritage Village Church & Missionary Fellowship, Inc. v. State*, 299 N.C. 399, 263 S.E.2d 726 (1980), the Eighth Circuit, noting that a "significant effect of the classification" was "to assist (by deregulation) certain religious groups, while burdening others," Jur. St. A-11, 637 F.2d at 568, "conclude[d] that the Minnesota Statute prefers some religions over others." *Id.* A-14, 637 F.2d at 569.[12] The court, therefore, was on exceedingly sound ground when it invalidated the provision since, as has been recognized from the Court's earliest case dealing with an establishment clause challenge to a state statute, *see Everson v. Board of Education*, 330 U.S. 1, 15 (1947), perhaps the first principle of the clause is that it "forbids . . . governmental preference of one religion over another." *School District v. Schempp*, 374 U.S. 203, 216 (1963). But preference is precisely the result of Minnesota's starkly differential scheme of state regulation, which is expressly aimed at churches alone.

In these circumstances, the result of the selective exemption is to

> favor[ ] only those religious organizations which solicit primarily from their own members. The inescapable impact is to accord benign neglect to the more orthodox, denominational, and congregational religions

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[12]Appellants' claim that appellees "proffered no evidence that the duties of the non-exempt religious organizations amount to any substantive burden," Jur. St. 16, borders on the frivolous. The court of appeals noted that "the burden of compliance with the Act is certainly not *de minimus*." *Id.* A-11, 637 F.2d at 568. That this conclusion is an understatement is demonstrated by the court's careful analysis of the Act's requirements for non-exempt organizations. *Id.* A-11 to A-14, 637 F.2d at 568-69. The North Carolina Supreme Court easily reached precisely the same result. *Heritage Village Church, supra*, 299 N.C. at 411, 263 S.E.2d at 733. Indeed, the mere fact that non-exempt churches are the only ones routinely required publicly to disclose the innermost workings of their financial affairs alone places them at a substantial comparative disadvantage.

> while subjecting to regulation those religions which spread their beliefs in more evangelical, less traditional ways. This the state may not do.

Heritage Village Church, supra, 299 N.C. at 411, 263 S.E.2d at 737.

Otherwise put, the inter-church neutrality mandated by the establishment clause cannot tolerate the selective regulation of churches according to their religious practice and tenets. The decision of the courts below that the exemption provision is therefore not neutral in its effect is clearly correct.

Moreover, two additional factors exist which, while perhaps strictly unnecessary to the holding, render the illegitimacy of the statutory classification even more readily apparent. The impermissible effect of section 309.515(1)(b) is first illustrated by the fact that the means-end fit of the statute is drastically askew. As the court of appeals noted, of the six exemption provisions of Minn.Stat. §309.515 (1980), that relating specifically to religious organizations, *id.* §309.515(1)(b), is unique. Jur. St. A-9, 637 F.2d at 565. The other five either constitute complete exclusions or limit their scope to organizations with a minimal absolute level of public financial participation. These exemptions thus "appear[] generally to serve the valid purpose of freeing from regulation certain organizations for which public disclosure of funding would not significantly enhance the availability of information to contributors." *Id.* A-9, 637 F.2d at 567.

In contrast, the provision aimed directly at churches rests on an entirely different basis. Eschewing specifically for the religious category of charitable organizations reliance simply upon an across-the-board criterion of significant public contribution, *see* Minn.Stat. §309.515(1)(a) (1980), the statutory scheme there imposes as well a *relative* measure of such contributions to determine whether or not a particular church is exempt.

The special exemption provision for churches makes little apparent sense. Jur. St. A-6, 637 F.2d at 565-66. The state had asserted that the Act, including its exemption provisions, was enacted to prevent fraud in charitable solicitations and to "assist[] informed decisionmaking by Minnesota's charitable contributors . . . ." Brief of Appellants-Cross-Appellees at 17 (8th Cir.). Manifestly, however, the danger of fraud and the need for public awareness is surely no greater with respect to an exempt church which, for example, receives from non-members $1 million of a total of $2 million in contributions than it is with respect to an non-exempt church which similarly receives $10,001 of a total of $20,000. Indeed, the vastly greater total volume of public contributions in the former case would lead one logically to expect that the asserted state purposes would be far more at risk in that situation.[13]

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[13]Reminded by the Eighth Circuit of "the absence of any explanation for the sizable loophole created [by the church exemption provision] for some religious organizations," Jur. St. A-7, 637 F.2d at 566, appellants now seek to construct one. They assert that "when an organization raises more than half of its monies from non-members, it becomes by definition more the financial creature of the public than of its internal membership. At this point, there is a greater public need in providing some sort of external check in its fund-raising activities." *Id.* 18. The very same contention was, for good reason, resoundingly rejected by the North Carolina Supreme Court. *Heritage Village Church, supra,* 299 N.C. at 411-12, 263 S.E.2d at 733-34.

Quite clearly there is nothing talismanic in this context about a 50% cut-off point. If state "concerns of accountability," Jur. St. 19 n.8, exist with respect to organizations with small absolute amounts of public contributions but which exceed the 50% criterion, the same concerns are necessarily present with respect to large churches exempt under the provision. In both situations public dollars are being contributed for which, in appellants' view, the public deserves an accounting.

A large-membership group is equally likely, for example, to engage in misrepresentation in public solicitation if it believes that to be an expedient method of garnering the greatest amount of money for its cause. Any "ongoing and consistent contact with its membership" would thus be irrelevant as "a check on its financial practices." See *id.* 18.

Moreover, appellants' very concept of a church which is "more the financial creature of the public than of its internal membership," *id.*,

(footnote continued on following page)

Second, by reason of the nature of the classificatory criterion of the statute, its burdens predictably will fall with greatest impact upon those churches which, through either religious belief or perceived necessity, look to the public at large rather than to a discrete and stable membership body for their support, resulting in "an inhibition by the state of a specific mode of religious practice . . . ." *Heritage Village Church, supra,* 299 N.C. at 411, 263 S.E.2d at 733.

Among the former are religious societies which, by scriptural command, spread their beliefs through "missionary evangelism", that is, which "seek through personal visitations to win adherents to their faith." *Murdock v. Pennsylvania,* 319 U.S. 105, 108-09 (1943) (footnote omitted). That "[t]his form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits" and "has the same claim to protection as the more orthodox and conventional exercises of religion" has long been recognized. *Id.* at 109.

Within the latter category one may expect to find "newly organized or minor cults and creeds," *Troyer v. Town of Babylon,* 438 F.Supp. 1135, 1139 (E.D.N.Y.), *aff'd mem. sub nom. Troyer v. Town of Southampton,* 628 F.2d 1346 (2d Cir.), *aff'd mem.*, 101 S.Ct. 522 (1980) (No. 80-333), which, lacking a sufficient existing base of support, need

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would seem to raise more religion clause problems than it answers. This assertion smacks of an unacceptably broad "*parens patriae* claim," *Wisconsin v. Yoder,* 406 U.S. 205, 234 (1972), potentially highly destructive of the first amendment's purpose "to chart a course that preserve[s] the autonomy and freedom of religious bodies. . . ." *Walz v. Tax Comm'n,* 397 U.S. 664, 672 (1972). *See also NLRB v. Catholic Bishop,* 440 U.S. 490 (1979).

Finally, the solace the state seeks for broad legislatvie discretion to draw whatever lines it chooses is not to be found in the cases that it cites, *Minnesota v. Clover Leaf Creamery Co.*, 101 S.Ct. 715 (1981) (No. 79-1171); *City of New Orleans v. Dukes,* 427 U.S. 297 (1976); and *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955), all economic regulation cases. Jur. St. 19. More to the point is the admonition of *NAACP v. Button,* 371 U.S. 415 (1963), that, in the first amendment context, "[p]recision of regulation must be the touchstone." *Id.* at 438.

to solicit funds from prospective or newly-won sympathizers. The first amendment requires that these groups, too, receive equal solicitude at the hands of the state since "[f]reedom of religion is not merely reserved for those with a long purse." *Follett v. Town of McCormick*, 321 U.S. 573, 576 (1944).[14]

For all of these reasons, the exemption provision manifestly violates the establishment clause. The judgment of the Eighth Circuit should therefore be affirmed.

III.

The Decision of the Court of Appeals Is Entirely Consistent With *Gillette v. United States*.

While the state, as it has throughout this litigation, harps on *Gillette v. United States*, 401 U.S. 437 (1971), denominating it as "controlling", Jur. St. 19, *Gillette* simply has no bearing upon this case. *Gillette* involved only a de facto distinction among religious adherents created by a considered Congressional accommodation of religious exercise, whereas the line drawn by the Minnesota Charitable Solicitations Act, Minn.Stat. §309.515(1)(b) (1980), on its face

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[14]Appellants complain of what they see as a "lack of factual bases underlying the Circuit Court's conclusions . . . ." Jur. St. 14. See *id.* at 14-16. This complaint, however, is little more than a tempest in a teapot, for the "very nature" of the statutory scheme, *cf. Walz v. Tax Comm'n*, 397 U.S. 664, 695 (1972) (Harlan, J., concurring) (entanglement), is to burden only some churches with a high degree of state regulation. The law necessarily " 'favor[s]' ", Jur. St. 15, some religious organizations over others. Whether or not the set of favored groups is precisely congruent to that of " 'well-established' " churches, *id.* (quoting *id.* A-7, 637 F.2d at 566), is simply unnecessary for a finding of forbidden effect under *Lemon*, and the court of appeals did not rely on any such "finding" for its conclusion on this point. See *id.* A-14, 637 F.2d at 569. This fact, however, does not detract from the force of the conclusion, evident to both courts below as well as to the North Carolina Supreme Court in *Heritage Village Church, supra*, that, as a general matter, the statutory scheme can be expected to operate disproportionately to visit its burdens on "churches which are new and lacking in a constituency . . . ." Jur. St. A-7, 637 F.2d at 566.

selects some churches for favored treatment over some others whose religious exercise the statute burdens.

Gillette concerned the constitutionality of the conscientious objection provision of the Military Selective Service Act of 1967, 50 U.S.C. App. §456(j) (1976), that relieved from conscription those with conscientious scruples against participation in all wars but not those with similar scruples relating to particular conflicts. As this Court noted, the "critical weakness" of the claim that this provision worked an establishment of religion arose from the fact that the statute did not "on its face . . . discriminate on the basis of religious affiliation or religious belief, apart of course from beliefs concerning wars." *Gillette v. United States, supra*, 401 U.S. at 450. "Properly phrased," therefore, the establishment clause contention was that the failure to exempt selective conscientious objectors worked "a de facto discrimination among religions." *Id.* at 451-52.

The Court's conclusion, that a line drawn on the basis of beliefs concerning war does not constitute a facial religious discrimination, follows from the fact that a claim of autonomy based upon conscience with regard to military service is essentially identical to a claim of autonomy with regard to other types of secular behavior such as the use of drugs or the practice of polygamy. In either case the belief in the claim for autonomy may be dictated by religious belief or personal ethics, it may be held with various degrees of intensity and sincerity by the individual, and it may be of more or less significance in his life.

Consequently, while in every case in which the belief that certain behavior is compelled is religiously motivated "a balancing process," *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972), is necessary in order to ensure that the general regulation of behavior does not unduly burden the free exercise of religion, *Thomas v. Review Board*, 49 U.S.L.W. 4341, 4344 (U.S. Apr. 6, 1981) (No. 79-952); *Wisconsin v. Yoder, supra*, 406 U.S. at 220, the regulation of behavior

is not an establishment of religion merely because some religious creeds may mandate the behavior while others do not. *See Harris v. McRae*, 100 S.Ct. 2671, 2689 (1980) (No. 79-1268). While the government can, and, as *Yoder* and *Thomas* illustrate, often must, accommodate on an individual basis a claim for autonomy for religiously-mandated behavior, to fail to do so neither favors or disfavors religion more than it favors or disfavors claims for autonomy that are ethically or otherwise based.[15]

On the other hand, this Court has long recognized that governmental distinctions based upon "religious organization or religious creed," *Gillette v. United States*, 401 U.S. at 451,[16] contravene the establishment clause. Prohibition of governmental preference of one religion over another is at the very core of the clause. *School District v. Schempp*, 347 U.S. 203, 216 (1963). "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice." *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

Neutrality in religious practice is precisely what the state has abandoned by its decision to regulate the solicitations of some churches but not others. The exemption provision of the Minnesota Act on its face exempts from regulation those religions that receive "less than half of their funds from the public." Jur. St. A-7, 637 F.2d at 566. In practical terms, this distinction overtly disfavors those "churches which are new and lacking in a constituency, or which, as

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[15]Favoring theistic over non-theistic belief may well constitute an establishment of religion, *Welsh v. United States*, 398 U.S. 333, 356-61 (1970) (Harlan, J., concurring); *see id.* at 343-44 (majority opinion); *United States v. Seeger*, 380 U.S. 163, 184 (1965), but that question is fortunately not presented by this case.

[16]The state conveniently overlooks this portion of the *Gillette* opinion in its brief, and leaves the impression that de jure discrimination can only arise from distinctions among religious affiliations and beliefs, see Jur. St. 20, although the opinion as a whole leaves no doubt that distinctions among religious organizations are as invidious as those among beliefs.

a matter of policy, may favor public solicitation over general reliance on financial support from members." *Id.*[17]

Thus, *Gillette* involved no more than a claim for autonomy for religiously mandated behavior of individuals, which this Court nonetheless carefully reviewed in order to determine whether it was a de facto "religious gerrymander." *Gillette v. United States, supra,* 401 U.S. at 452. Here, to the contrary, the state has in terms distinguished among churches on the face of the statute.[18]

Even were *Gillette* a comparable situation of discrimination and not an entirely distinct analytical problem, *compare, e.g., Personnel Administrator v. Feeney,* 442 U.S. 256 (1979) (de facto discrimination of great practical importance held to be constitutional) *with, e.g., Craig v. Boren,* 429 U.S. 190 (1979) (de jure discrimination of marginal significance held to be unconstitutional), it would still be a wholly different case. The *Gillette* statute came to this Court with a momentum of respect arising from the attempt by Congress to itself accommodate the free exercise claims of those opposed to all wars and the entanglement with religion which it feared would be engendered by "expansion of the exemption to cover objectors to particular wars." *Gillette v. United States, supra,* 401 U.S. at 450; *cf. McDaniel v. Paty,* 435 U.S. 618, 637-38 (1978) (Brennan, J., concurring) (accommodation between free exercise and establishment clauses). Because these Congressional concerns were eminently "supportable", the statute was con-

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[17]This observation of the Eighth Circuit simply translates the definition of the line drawn by the Act from abstract legal terminology into concrete, realistic description. Even were the discrimination worked by the Act not inherently invidious, however, *Gillette* would still be irrelevant because it distinguishes on its face among churches. Since the distinction is de jure and not de facto, it must therefore be measured by the familiar three-prong establishment test of *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971), and its progeny.

[18]Contrary to the state's assertion, Jur. St. 20, neither did the court below find nor have appellees ever contended that the Act's distinction is de facto.

stitutional. *Gillette v. United States, supra,* 401 U.S. at 460.

No equivalent balancing of first amendment interests is presented in the instant case. On the contrary, only by striking down the Act's selective exemption did the lower courts both promote the free exercise of religion, unencumbered by the onerous requirements differentially imposed by the Act, and obviate the establishment clause violations which would result from the Act's unequally applied burdens.

The court of appeals carefully considered *Gillette* but found it to be irrelevant. Jur. St. A-10 to A-11, 637 F.2d at 567-68. This conclusion is clearly correct.

Conclusion.

Appellants present no substantial question for decision by this Court. The judgment of the United States Court of Appeals for the Eighth Circuit should therefore be affirmed.

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Respectfully submitted,

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